IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONER

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THE INSTANT CASE IS NOT GOVERNED BY ERIE R.R. CO. v. TOMPKINS.

The Respondents first argue that the instant case is governed by *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938) [Brief of the Respondent at 10]. Consequently, they argue, Petitioner's § 1983 action is controlled by state law. This argument is grossly misleading. *Erie* was a diversity suit and stands for the proposition that in a diversity suit, the

law of the state must be applied. In so holding the Court stated:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State." [*Id.* at 78].

42 U.S.C. § 1983 is, of course, an Act of Congress passed to protect federal constitutional rights. Consequently, the *Erie* doctrine has absolutely no applicability to the instant case.

In *Pritchard* v. *Smith,* 289 F.2d 153 (8th Cir., 1961), a case cited with approval by this Court in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), the court specifically rejected the Respondents' contention. In *Pritchard*, the court was faced with the question of whether a § 1983 action survived the death of the victim. In holding that it did, the court stated:

> We fully agree with the trial court's conclusion that this is an action arising under federal statute and that consequently federal law governs. In such a situation, the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, does not apply.

Accord, *Martin* v. *Duffie,* 463 F.2d 464, 468 (10th Cir., 1972). See also, *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

While state law may not *control* an action brought pursuant to the federal Civil Rights Acts, it may be utilized when necessary. As this Court noted in *Moor* v. *County of Alameda, supra*, there will inevitably be instances where federal law does not cover every issue which may arise in the course of a § 1983 action. In such instances, the courts may utilize state law "where federal law is unsuited or insufficient to furnish suitable remedies. . . ." [*Id.* at 703]. Accord, *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

The Respondents' misreading of *Erie R.R. Co.* v. *Tompkins, supra*, leads them to the incorrect conclusion that federal common law does not control the instant action [Brief of the Respondent at 18]. Yet, in *Moor* and *Sullivan,*[1] this Court clearly stated that federal law governs the instant action, and numerous circuit courts have held that the measure of damages in a § 1983 action is governed by federal common law. See, *e.g. Basista* v. *Weir*, 340 F.2d 74 (3d Cir., 1965); *Harrison* v. *United Transportation Union*, 530 F.2d 558 (4th Cir., 1975); *Martin* v. *Duffie, supra*; *Seaton* v. *Sky Realty Co.*, 491 F.2d 634 (7th Cir., 1974). See also, *Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir., 1977). See generally, Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Note, *Choice of Law Under Section 1983,* 37 U. Chi. L. Rev. 494, 506-512 (1970).

THE MEASURE OF DAMAGES IN § 1983 ACTIONS IS THE SAME WHETHER THE ACTION IS FILED IN FEDERAL OR STATE COURT.

The Respondents also suggest that had Ruby Jones filed her complaint in federal court, the measure of damages governing the case would be different [Brief of the Respondent at 19]. This argument completely ignores the doctrine of concurrent jurisdiction. Under this doctrine, both federal and state courts have jurisdiction to try cases brought pursuant to 42 U.S.C. § 1983. *Holland* v. *Perini*,

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[1] The Respondents' argument that *Sullivan* has been rejected by this Court in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), is incorrect. In fact, in reaching its decision in *Runyon,* this Court cited *Sullivan.*

512 F.2d 93 (10th Cir., 1975), *cert. denied* 423 U.S. 994; *Long* v. *District of Columbia*, 469 F.2d 927 (D.C. Cir., 1972). Since jurisdiction is concurrent, state courts are bound to fully enforce federal rights. As this court stated in *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876):

> The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are . . . . Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights.

Accord, *Testa* v. *Katt*, 330 U.S. 386 (1947); *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912).

The doctrine of concurrent jurisdiction, of course, only applies in situations in which Congress has not withdrawn jurisdiction from state courts. However, as Congress has not so limited state jurisdiction in actions brought pursuant to the civil rights acts, Ruby Jones acted entirely properly in filing her claim in a state court, which had no alternative but to hear her case. Moreover, because federal law is the supreme law of the land, the state courts were without jurisdiction to limit the federal claim. See generally, 1 Moore's Federal Practice ¶0.6[3].[2]

[2] That federal claims can be brought in state court is, of course, salutory. The federal dockets are becoming steadily longer and the state courts' ability to hear federal claims thus provides a source of relief to the overburdened federal courts.

THE PETITIONER'S FEDERAL CLAIM IS NOT ONE FOR THE WRONGFUL DEATH OF THE SON, BUT FOR THE DEPRIVATION OF HER OWN CONSTITUTIONAL RIGHT.

The Respondent states that the Petitioner has "arrested not a claim for deprivation of rights secured by the Fourteenth Amendment, but a claim for wrongful death under the laws of Colorado." [Brief of the Respondents at 23]. This statement goes to the very heart of the Respondents' mistaken analysis of the law governing 42 U.S.C. §1983. While it is course true that the Petitioner stated a wrongful death claim in her first two claims for relief, her federal claim is separate and distinct. In his concurring opinion in *Monroe* v. *Pape*, 365 U.S. 167 (1961), Justice Harlan emphasized this point, stating:

> A deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy *even though the same act may constitute both a state tort and the deprivation of a constitutional right.* [*Id.* at 196; emphasis added].

Hence, the fact that Ruby Jones has a state cause of action does not bar her from seeking a remedy for the deprivation of her federal rights.

In the instant case, it is clear that Ruby Jones has stated a claim for relief under 42 U.S.C. §1983. This argument may be viewed from two perspectives. In the first place, the decisions of this Court indicate that a parent has a right to raise one's children. *Stanley* v. *Illinois*, 405 U.S. 465 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); and it is equally clear that the state may not deprive a person of his

parental rights without the due process of law. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). Moreover, it is particularly important to note that the integrity of the family has found protection in the due process and equal protection clauses of the Fourteenth Amendment. *Stanley* v. *Illinois, supra*.

The Civil Rights Acts were passed in 1871 specifically to enforce the then new Fourteenth Amendment. Thus, it is particularly appropriate that they should be used to remedy interference with parental rights,[3] for when Douglas Hildebrant shot Larry Jones in the back of the head, he terminated Ruby Jones' parental rights just as surely as if a court had done so without due process of law. It is clear that Douglas Hildebrant has deprived Ruby Jones of her constitutional right to raise her child. The Colorado wrongful death act provides no remedy for this deprivation; the Civil Rights Acts do.

That Ruby Jones has stated a federal claim may be seen from a second point of view. Some courts have held that the Civil Rights Acts are deficient with respect to the question of who may sue where state action has resulted in death. Consequently, these courts have held that state law may be used to fill the interstices of federal law. See *e.g.*, *Mattis* v. *Schnarr*, 502 F.2d 464 (8th Cir., 1964). Under this analysis one looks to the law of the state to determine whether or not a state statute gives the survivor an

[3] The Respondent's claim that 42 U.S.C. §1986 indicates that §1983 was not intended to apply to actions resulting in death. [Brief of the Respondents at 29] has been consistently rejected. See, *e.g.*, *Moor* v. *County of Alameda, supra*; *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir., 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir., 1961). See generally, Brief of the *Amici Curiae* at 24-31. A reading of §1986 shows its total inapplicability to a §1983 action since §1986 is concerned with people who fail to prevent conspiracies and not with the principal tortfeasor.

independent right to sue in her own name. Colorado has such a statute, Colo. Rev. Stat. Ann. §13-21-202 (1973), and there is no question that this statute creates an independent right in the survivor to sue on his own behalf. *Moffatt* v. *Tenney*, 17 Colo. 189, 30 P. 348 (1892)[4]

The Colorado wrongful death statute thus provides an alternative basis under which Mrs. Jones has standing to bring this federal action. As this Court has stated in *Sullivan* v. *Little Hunting Park, supra*, "The existence of a statutory right implies the existence of all necessary and appropriate remedies." 396 U.S. at 239. Since the Colorado wrongful death statute gives Ruby Jones a right to sue in her own name, she is entitled to sue under 42 U.S.C. §1983. *Perkins* v. *Salafia*, 338 F. Supp. 1325 (D. Conn., 1972).[5]

Nor is there any merit to the Respondent's claim that the Petitioner's argument would give a federal cause of action against public officials for "any tort they commit. . . ." [Brief of the Respondents at 25]. 42 U.S.C. §1983 is very limited

[4] Where a state has no such statute, the action is properly brought on behalf of the deceased's estate. *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir., 1974). Since Colorado has both a wrongful death statute, Colo. Rev. Stat. Ann §13-21-202 (1973), and a survivorship statute, Colo. Rev. Stat. Ann §13-20-101 (1973), the Petitioner could have sued either in her own name, or on behalf of Larry Jones' estate. She chose the first option. Cf. *Brazier* v. *Cherry, supra*.

[5] *Perkins* v. *Salafia, supra*, is valid insofar as it holds that where the state wrongful death law provides an independent right to sue in the name of the survivor, a §1983 action is proper. *Perkins* also stands for the proposition that where no such statute exists, and the state has only a survivorship statute, no federal cause of action exists. This second holding does not appear to be good law. See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Hall* v. *Wooten, supra*.

in its scope. It applies only to public officials who under the color of state law, intentionally subject a citizen to the deprivation of any constitutional right. This is much narrower than merely "any tort." Obviously, a public official who, driving carelessly, causes an automobile accident, is not liable for damages under § 1983, nor is a public official who defames someone liable under this statute. *Paul* v. *Davis*, 424 U.S. 693 (1976). But where, as in the instant case, a person, acting under color of State law, intentionally subjects a citizen to the deprivation of his civil rights, § 1983 provides a federal remedy.

JUSTICE IS LACKING IN THE CASE AT BAR, SINCE THE COLORADO COURTS HAVE RESTRICTED A FEDERAL STATUTE WITH AN ARCHAIC RULE OF DAMAGES.

The Respondent argues that, "Justice is not lacking in this case." [Brief of Respondents at 20]. This claim is as misguided as it is callous. Although Douglas Hildebrant intentionally shot and killed Ruby Jones' son, Larry, under the archaic Colorado law, she has been "compensated"by $1,500, $1,000 of which represents the cost of burying her son (A. 34). Of course, even this $1,000 must come from Mrs. Jones' own resources, since given the cost of modern litigation, she will never see a penny of the $1,500 awarded to her. Yet to the Respondents, this award was not unjust.

While the injustice of the present situation is obvious, Mrs. Jones would have no complaint if it at least resulted from a correct application of the law, but it does not. [6]

[6] In fact, the injustice of applying the state measure of damages precludes its incorporation into federal law. *Kaiser* v. *Kahn*, 510 F.2d 282 (2d Cir., 1974).

Petitioner filed a proper claim under a federal statute designed specifically to provide full compensation for the loss of her civil rights.

The Respondents seek to avoid the governing federal measure of damages by engrafting the Colorado net pecuniary loss rule onto the federal statute. They do so despite this Court's clear rejection of that rule. In *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974), the Court was confronted with the question of whether to limit the federal maritime law with the net pecuniary loss rule and, after an extended discussion, rejected that rule. The Petitioner can see no basis for reaching a different conclusion in the context of civil rights legislation. The Civil Rights Acts are remedial and were designed to provide a comprehensive remedy for the loss of constitutional rights. Consequently, they are to be liberally construed. *Green* v. *Dumke*, 480 F.2d 624 (9th Cir., 1973). Additionally, they were passed specifically to provide remedies where state remedies are inadequate. *Monroe* v. *Pape, supra.* Obviously, Colorado's net pecuniary loss rule has done nothing to compensate Mrs. Jones for the loss of her civil rights; it merely applies to the state death action. Under these conditions, this Court should reject the Respondents' attempt to engraft the net pecuniary loss rule upon § 1983 actions. Rather, this Court should apply the federal measure of damages to adequately compensate Mrs. Jones for the loss of her civil rights. *Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir., 1970).

Respectfully submitted,

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